

IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE DISTRICT OF DELAWARE

KICKFLIP, INC.,

Plaintiff,

v.

FACEBOOK, INC.,

Defendant.

: CIVIL ACTION

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NO. 12-1369 (LPS)

Wilmington, Delaware
Wednesday, October 7, 2015
Telephone Conference

BEFORE: HONORABLE **LEONARD P. STARK**, Chief Judge

APPEARANCES:

MORRIS JAMES, LLP

BY: KENNETH L. DORSNEY, ESQ.

and

NEWMAN DuWORS, LLP

BY: DEREK LINKE, ESQ., and

DEREK A. NEWMAN, ESQ.

(Seattle, Washington)

Counsel for Kickflip, Inc., d/b/a
Gambit

ROSS ARONSTAM & MORITZ, LLP

BY: DAVID EVAN ROSS, ESQ., and

BENJAMIN J. SCHLADWEILER, ESQ.

and

Brian P. Gaffigan
Registered Merit Reporter

1 APPEARANCES: (Continued)

2
3 COVINGTON & BURLING, LLP
4 BY: THOMAS O. BARNETT, ESQ.,
5 JONATHAN GIMBLETT, ESQ., and
6 LAUREN S. WILLARD, ESQ.
7 (Washington, District of Columbia)
8
9 Counsel for Facebook, Inc.

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11 P R O C E E D I N G S

12 (REPORTER'S NOTE: The following telephone
13 conference was held in chambers, beginning at 10:33 a.m.)

14 THE COURT: Good morning, everybody. This is
15 Judge Stark. Who is there, please?

16 MR. DORSNEY: Good morning, Your Honor. For our
17 plaintiff Kickflip, it's Ken Dorsney from Morris James; and
18 my co-counsel, Derek Newman and Derek Linke from Newman DuWors.

19 THE COURT: Okay.

20 MR. SCHLADWEILER: Good morning, Your Honor.
21 This is Ben Schladweiler and David Ross from Ross Aronstam
22 & Moritz on behalf of Facebook. We're joined today by
23 Jonathan Gimblett, Tom Barnett, Lauren Willard, and Sonya
24 Laura Pasteur from Covington.

25 THE COURT: Okay. Thank you very much. For the
record, and I do have my court reporter here, of course, it

1 is our case of Kickflip Inc. versus Facebook Inc., Civil
2 Action No. 12-1369-LPS. And this discovery dispute today
3 relates to a Facebook request for production of documents
4 and possibly logging of documents that are being withheld
5 on the basis of privilege.

6 So let me start with Facebook. Please go ahead.

7 MR. GIMBLETT: Good morning, Your Honor. This
8 is Jonathan Gimblett for Facebook.

9 Just to give a little bit of context for today's
10 call, the starting point for the teleconference is the
11 declarations that Kickflip filed on April the 17th on behalf
12 of Eric Benisek, an outside counsel, and Christopher Smoak,
13 their Chief Technology Officer admitting that the asset
14 transfer agreement that Kickflip had previously represented
15 was completed on December the 15th of 2009 was actually
16 created in March of 2012 in the midst of an IRS tax audit
17 and backdated in order to secure tax benefits.

18 So we had a telephone conference on June 12th
19 in which Kickflip highlighted two issues related to these
20 disclosures which we contended required further investigation:

21 One was whether the December agreement was created
22 for a fraudulent purpose and as such was null and void ab
23 initio and cannot be relied upon by the Court to establish
24 Kickflip's standing to go pursue this suit.

25 And the second issue is whether, given the

1 seriousness of Kickflip's repeated misrepresentations both to
2 Facebook and the Court, whether there had been a lack of due
3 diligence in discovery that might wind to sanctions.

4 At the end of that conference, you indicated
5 that was not reasonable and for us or indeed for the Court
6 to want to better understand what had happened, how it had
7 happened, and what, if any, of the implications were for the
8 litigation, and you ordered discovery as the way to get at
9 those facts.

10 So during the course of discovery since then,
11 Facebook has raised a number of concerns with Kickflip
12 concerning the scope of its production. After trying to
13 narrow those differences as much as possible, we've asked
14 you today to address just a few remaining issues which we
15 believe go to the heart of the inquiry that you ordered in
16 June. And this might be a good moment to pause and ask
17 whether you would like us to take all three issues at the
18 same time or whether you would like to go one by one.

19 THE COURT: I would like you to take all three
20 at once, but let me preface it by asking you, it's not
21 entirely clear to me how the three issues relate to each
22 other, so to be concrete, if I required them to do the
23 privilege log you are asking for and then allowed them to
24 also submit the documents for in camera review that they're
25 proposing, would that potentially take care of today's

1 issues or is there a third something else that you are
2 asking for today?

3 MR. GIMBLETT: No. Well, I summarize it by
4 saying there are two principal things that we're asking for
5 today:

6 The first, we're asking that you order
7 production of documents related to November and December
8 agreements, just documents created prior to October
9 the 14th, 2013.

10 And the second thing we're asking is that you
11 order that they search for and log documents related to two
12 of our document requests that go directly to the question
13 of their due diligence.

14 The third issue is this: The parties have
15 already agreed to that Kickflip will submit certain
16 documents for in camera review. We put that in the letter
17 so that it would be plain on the face of the letter that
18 that issue would be before the Court. I don't think there
19 is much disagreement except that we will probably ask you to
20 order or permit us to submit a short brief if it's submitted
21 to the Magistrate Judge.

22 THE COURT: Well, with that, go ahead and
23 address the two or three issues as you see them.

24 MR. GIMBLETT: Right. So let me start with the
25 question of the documents related to November and December

1 agreements.

2 We were deliberately narrow in our document
3 requests concerning these agreements asking only that Kickflip
4 and its litigation counsel produce documents created on or
5 before October the 14th, 2013. The significance of that date
6 is that that was when Kickflip introduced the December
7 agreement into the litigation, submitting it to the Court in
8 support of its contention that there is no need for discovery
9 on standing, and discovery on standing that the Court has in
10 fact already ordered.

11 Now, we now know, what we didn't know at the
12 time, that the December agreement was created not on
13 December the 15th, 2009 but only seven months before the
14 initiation of this litigation. And we also know, as a
15 result of the most recent phase of document production, that
16 the specific reasons why it was created and then backdated
17 to December 2009 was to serve personal financial needs and
18 in view of anticipated Facebook lawsuit.

19 So with the benefit of that knowledge, it seems
20 quite likely to us that litigation counsel's documents
21 referring to agreements in the period before they introduced
22 the December agreements will disclose important facts.
23 Those facts might include whether there was fraudulent
24 intent on Kickflip's part in representing this is an
25 agreement to December the 15th, 2009; what Kickflip's

1 understanding was of the effect of the November agreement on
2 its standing; and what litigation counsel knew at the time
3 they submitted this agreement about the true circumstances
4 of its creation.

5 As we have set out in our letter brief, we
6 believe that there are two bases on which the Court should
7 order production of these documents: First, they fall
8 squarely within the claim language of the waiver found by
9 the Court in its order of January 21, this year. And that
10 order, actually the memorandum opinion accompanying the
11 order, you stated the way that extended two, but only two,
12 the November and December agreements, including the notice
13 for and the effects of entering into them as well as the
14 negotiation, performance, and implementation of these
15 agreements.

16 Now, Kickflip has argued that that formulation
17 should be read to mimic the way the specific examples of
18 license that you stated were within the scope. Namely, the
19 motives for and entering into the agreement, negotiation,
20 performance, et cetera; but if you look at the January 21
21 memorandum, in context, it is quite clear that is not, that
22 wasn't the basis for the reasoning.

23 In fact, the memorandum cites two things that
24 Facebook has requested be included within the scope of the
25 waiver: The first point was any documents previously

1 withheld as privileged relating to November and December
2 agreements. And the second was any documents reviewed or
3 relied upon by Mr. Smoak in drafting his earlier declaration.

4 And the decision you reached basically granted
5 the first of those requests and denied the second request
6 which you thought would unduly risk requiring Kickflip to
7 disclose communications outside the subject matter.

8 So we believe that the wording of the waiver
9 as expressed in the January 21 order is clear, and that
10 documents related to the November/December agreement, which
11 is precisely what we are asking for are covered by it.

12 There is a second basis, however, if you
13 conclude differently on the scope of the waiver, and that
14 is the exception to the attorney-client privilege. Here,
15 the case law of the Third Circuit is clear. We cited a
16 case in our letter brief which makes clear that the
17 attorney-client privilege is broken where there is a
18 reasonable basis to suspect that the privilege holder was
19 committing or intending to commit a crime of fraud and that
20 the attorney-client communications or attorney work product
21 were used in the furtherance of the alleged crime of fraud.

22 Now, in their responsive letter brief, Kickflip
23 has suggested that that doesn't apply because there is no
24 suggestion that litigation counsel participated in the fraud.

25 If we look, though, at the case we cited, that

1 is very clear that the knowledge of litigation counsel is
2 neither here nor there. This is the case *In Re: Grand*
3 *Jury Investigation*, 445 F.3d 266. And the specific language
4 I'm citing can be found at 279, note 4, where it states,
5 "Of course, the crime fraud exception applies even when an
6 attorney is unaware that the client is engaged in or planning
7 a crime."

8 Again, from the circumstances here, the disclosure
9 that the December agreement was actually created seven months
10 before the beginning of this litigation, that it was created
11 specifically with a view to establishing a record on ownership
12 for this litigation, we believe that that constitutes ample
13 grounds to suspect that the documents that we're after may
14 well establish fraudulent intent on Kickflip's part.

15 If there are no questions on that part, on that
16 item, I can move on to the second issue.

17 THE COURT: Go on to the second issue, and then
18 we'll come back and I'll ask my questions. Go ahead.

19 MR. GIMBLETT: So the second issue relates to
20 the logging of documents relating to Kickflip's discovery
21 efforts. And the two issues addressed in the relevant
22 documents requests covered by this issue goes to the heart
23 of the concerns discussed on the June 12th teleconference.

24 Firstly, what, if any, action Kickflip and its
25 counsel took to establish the true dates of the December

1 agreements creation after Facebook began to raise questions
2 about it in February of this year.

3 And, second, what, if any, evidence there is
4 to support Mr. Benisek's contention in his April 17th
5 declaration that he suffered a hard drive failure in 2012
6 in which he lost many otherwise responsive documents. And
7 that was a hard drive failure for which there had been no
8 disclosure prior to April the 17th, 2015.

9 Now, we've tread carefully around these issues
10 in view of Kickflip's assertion that any such documents
11 are privileged. We're not asking today that you order
12 production of responsive documents, only that you order that
13 they be searched for, and that they be listed on a privilege
14 log.

15 That treatment is consistent with Kickflip's
16 assertion the documents are privileged. It does represent
17 a limited modification of the Court's default standard on
18 discovery which provides that normally there is no
19 requirement for counsel to load documents created after the
20 beginning of litigation, but that is a default standard and
21 by definition default standards can be departed from when
22 the circumstances require.

23 In our view, the circumstances here are utterly
24 extraordinary, and particularly in view of the concerns
25 aired by the Court in June, it's amply warranted we believe

1 that that departure from the default standard be required.

2 We believe that locating these documents will be
3 a useful next step. Firstly, if Kickflip can find no such
4 documents, that will establish important facts relevant to
5 their diligence and potentially relevant to your discretion
6 on the discovery sanctions. But if it does find documents,
7 the log may well disclose or potentially in camera review
8 may disclose whether an exceptions privilege such as the
9 crime fraud exception applies to those documents.

10 And then very quickly on the third issue, the
11 question of in camera review. Kickflip has already agreed
12 to submit certain specified documents for in camera review.
13 They have done so on the condition that they could be
14 reviewed by the Magistrate Judge.

15 We don't oppose that request. We think it is
16 to your discretion. We do see some potential inefficiency
17 in asking the Magistrate Judge who is not aware or educated
18 with the facts of this case to do this from scratch and
19 therefore if that is the way that you order in camera review
20 to be conducted, we would ask that you allow us to submit a
21 short brief memo of five pages so that we can provide the
22 context necessary to help the Magistrate Judge support any
23 information of relevance here.

24 So we let me pause there, and if you have any
25 questions I'll be happy to answer them.

1 THE COURT: I do.

2 In terms of the logging request, one of the
3 criticisms from Kickflip is that you are essentially in
4 their view requiring them potentially to log sort of daily
5 activities over the course of this litigation, potentially
6 every communication they've had, that is, litigation counsel
7 has had with their client, and that that would therefore be
8 unduly burdensome even under the circumstances here.

9 Respond to that.

10 MR. GIMBLETT: Well, the context of the request we
11 explained in the June 12th teleconference was that beginning
12 in February, 2015, we flagged on numerous occasions to
13 Kickflip and to its counsel that there are serious questions
14 about whether the December agreement was actually created in
15 December of 2009. We did so at the deposition of Mr. Smoak on
16 February the 25th, I think it was. We did so fuller in RFPs
17 specifically asking Kickflip to produce any document that
18 referenced the December agreements with its creation date. We
19 did so in our supplementary brief on summary judgment.

20 What necessitated it at the time was a statement
21 in Kickflip's reply brief, supplementary reply brief that
22 there was no basis for our contention that the question mark
23 as to when the December agreement was created.

24 So if there was a concern here about this being
25 an unbounded request, I think that we could specify a time

1 range for the request which would cover those concerns
2 specifically. I could see this being a request for
3 documents created on or before January the 21st, 2015, for
4 example, which would cover all of those events that I just
5 recounted and demonstrate whether in fact Kickflip or its
6 counsel did anything between our first raising this issue
7 in February and their statements in late April, that those
8 are the basis for our contention to actually investigate the
9 facts.

10 THE COURT: Would you be agreeable to a back-end
11 cutoff date for the logging of, I don't know, April or
12 thereabouts?

13 MR. GIMBLETT: Yes, I think the logical back-end
14 date would be April the 17th, which was the date on which
15 the Benisek and Smoak declarations were submitted. So up
16 to, and including, that date.

17 THE COURT: And then --

18 MR. GIMBLETT: The request about --

19 THE COURT: Go ahead.

20 MR. GIMBLETT: I'm sorry, Your Honor. So that
21 relates to our request on the question of the creation date
22 of the agreement.

23 The other part of our request was the documents
24 relating to the alleged failure of Mr. Benisek's hard
25 drive. That I don't see that being quite so easily limited

1 in time. Mr. Benisek has represented that the failure
2 happened at some point in 2012. He can't say exactly when.

3 I think we would be interested in seeing any
4 documents in the beginning in 2012 on which that substantiates
5 that we had this hard drive failure. I don't believe it's
6 that burdensome a request because Kickflip can use, quite
7 easily use such search terms that would pull up correspondence
8 between themselves and Mr. Benisek or perhaps litigation
9 counsel, documents that reference a hard drive failure or a
10 laptop failure.

11 THE COURT: Okay. And in terms of really the
12 first issue about the production of documents, I guess my
13 first question is, do you agree that the documents already
14 produced establish at least that litigation counsel were not
15 involved in the actual backdating of the December agreement?

16 MR. GIMBLETT: I think we want to see the
17 kinds of the documents before we draw any hard and fast
18 conclusions because the course of this litigation has
19 demonstrated how much misunderstanding can evolve on the
20 basis of new disclosures.

21 I will say that I think there are certain
22 documents that would support that contention and the fact
23 that apparently they were engaged in April 2012 when the
24 agreement was created in March of 2012. That is not the
25 only issue in play here, though. Another issue is what

1 their knowledge was at the time the December agreement was
2 introduced into the litigation in October of 2013. And I
3 think in a general context here, it's reasonable to suspect
4 that there may be information in these documents that go to
5 that issue.

6 I would also flag -- and this is something that
7 we mentioned in our submission before the June hearing --
8 the curious objection as proposed by Kickflip's counsel
9 during a deposition of Mr. Smoak in November of 2013. When
10 I asked Mr. Smoak, the question was:

11 "Question: At the time this agreement was
12 concluded, December the 15th, 2009, Gambit Labs was already
13 operating the GetGambit Internet payment business, wasn't
14 it?"

15 And the response or the objection was:

16 "Mr. Newman: Objection. Misstates the date of
17 the agreement, vague as to time."

18 And my follow-up question asks Kickflip's
19 counsel to explain the basis of that objection and was
20 followed by a long silence and nervous station.

21 So I think there are facts in the record which
22 gives a basis to suspect that those documents could be
23 educative.

24 THE COURT: And what was the timing of that
25 deposition?

1 MR. GIMBLETT: It was November the 25th, 2013.
2 And the document item is 62, Exhibit 2, and the text that I
3 just read out was page 71.

4 THE COURT: And that was before the time that
5 you put the plaintiff on notice that you had some suspicions
6 about the date of the agreement; correct?

7 MR. GIMBLETT: Correct. It was about 15 months
8 before we did so.

9 THE COURT: In terms of the possible application
10 of the crime fraud exception to the attorney-client privilege,
11 your argument I think is not whether or not there was fraud-
12 ulent intent in connection with the backdating that evidently
13 occurred I think around 2012 but whether or not there was
14 fraudulent intent by litigation counsel introducing that
15 backdated document into the case in this court. Is that
16 generally your position?

17 MR. GIMBLETT: I think it is possible we might
18 discover facts going to either of those frauds. And you are
19 right, there are two different frauds at issue here. One
20 is a potential tax fraud in the initial backdating and the
21 second is a potential fraud on the Court by representing
22 this is an agreement of December the 15th, 2009 when we
23 have reason to suspect that did certainly and potentially
24 as litigation counsel knew that that was not the case. I
25 wouldn't exclude that the documents we're asking for would

1 have information relevant to both of those frauds.

2 THE COURT: All right. Thank you. Let me hear
3 from Kickflip, please.

4 MR. NEWMAN: Thank you. Good morning, Your
5 Honor. This is Derek Newman.

6 The first of Facebook's first two issues is
7 whether litigation counsel's documents relating or referring
8 to the November or December agreements that are otherwise
9 privileged and work product are within the scope of the
10 January 21 waiver.

11 They are not. The January 21 waiver concerned
12 attorney-client communications that occurred before
13 litigation counsel was ever engaged. And, in fact, when
14 the parties briefed how narrow or broad that waiver should
15 be, Kickflip sought a narrow waiver and Facebook sought an
16 extraordinarily broad waiver.

17 Facebook originally sought, as Mr. Gimblett
18 acknowledged, any documents reviewed or relied upon by Mr.
19 Smoak in drafting his declaration concerning the subject
20 matters as to which Kickflip in Volume 11 had waived
21 privilege. And presumably Facebook sought that because
22 if there was a waiver, documents that he reviewed when he
23 signed a declaration causing that waiver are relevant.

24 But the Court rejected that and found that the
25 waiver only extends to the November and December agreements,

1 including the motives for and effects of entering them
2 as well as the negotiation, performance, and implementation
3 of those agreements.

4 The Court noted that expanding the waiver beyond
5 that, in other words, allowing the disclosure of documents
6 that Smoak reviewed when he waived the privilege, expanding
7 the waiver beyond that would encompass a lot more than
8 Facebook was entitled to. And the Court wrote that it would
9 unduly risk requiring Kickflip to disclose communications
10 outside the subject matter of what is disclosed in the
11 declaration.

12 All the documents that Facebook seeks now are
13 outside the subject matter of what was disclosed in the
14 January 2014 declaration. And if the Court did not extend
15 the waiver to communications that Mr. Smoak reviewed to
16 prepare a declaration actually waiving the privilege, then
17 the Court should not allow communications among counsel that
18 weren't in connection with waiving the privilege and don't
19 relate to the execution of the November/December agreements.

20 We have to keep in mind that the privilege that
21 was waived was about legal advice given before litigation
22 counsel was ever engaged. And that is the scope of the
23 waiver. The waiver can't be prospective. It can't relate to
24 advice that occurs long after the waiver occurred. It can't
25 relate to advice that is outside the scope of the advice given

1 that was waived which occurred before litigation counsel was
2 ever engaged.

3 The attorney-client privilege is absolute. It
4 can be waived, and it was here, and the Court found the
5 scope of that waiver, but it is absolute. And the waiver
6 here is limited to communications before March 2013 about
7 why the parties entered into the November and December
8 agreements.

9 We were engaged after that. And for that
10 reason, the waiver cannot extend to communications with
11 litigation counsel that occurred long after that.

12 Now, Facebook argues that these documents are
13 relevant, the documents they seek. And they might be, but
14 the privilege is absolute.

15 Relevance is not the standard. And, in fact,
16 generally, the communications between an attorney and a
17 client in connection with litigation is always relevant
18 to that litigation. It doesn't mean that there is an
19 additional waiver of the privilege.

20 The second issue that Facebook presents is
21 whether litigation counsel should search for and log all
22 work product and privilege communications about three
23 issues: when the December agreement was created, Mr.
24 Smoak's April 2015 declaration, and Benisek's hard drive
25 failure.

1 Litigation counsel should not have to undertake
2 that burden. Again, there is no attorney-client privilege
3 waiver for litigation counsel's review and analysis of the
4 December agreement, or Mr. Smoak's declaration, or the hard
5 drive failure.

6 The crime fraud exception doesn't apply because
7 litigation counsel was not engaged until April 2012. So if
8 there is an exception, and I don't think there is, but if
9 there is, it would apply to Mr. Benisek, his firm, but not
10 to litigation counsel, because we weren't involved at the
11 time, at the time that the alleged fraud occurred.

12 And there is not fraud on the Court as Facebook
13 now argues. We filed this declaration of Mr. Smoak and Mr.
14 Benisek disclosing it as soon as we learned about it. It
15 wasn't prompted by anything. It's not like Facebook asked
16 us to file a declaration or the Court had some suspicions
17 and asked us to look into it.

18 I think the Court and Facebook was as surprised
19 by the declaration as we were to learn that the document
20 was executed after December of 2009. So there wouldn't be a
21 fraud on the Court and any document relating to a hard drive
22 failure would be available from Eric Benisek. You don't
23 need to search my files for it.

24 I don't know if I have any documents relating
25 to the hard drive failure, but I do know that it would take

1 hours and hours to search through all the e-mails, even
2 using search terms to uncover that.

3 The burden to search among documents is
4 substantial, and that burden far outweighs any futility.
5 It doesn't bear on the issue of standing or the validity of
6 the agreement that was signed seven months before litigation
7 commenced. All the documents that are in my files are
8 privileged and work product. And there is no purpose in
9 logging them because there would be no reason why we would
10 have to disclose them.

11 The third issue that Facebook raises is whether
12 the Court should review seven specific documents that Facebook
13 requested.

14 The background on that is Eric Benisek sent his
15 declaration to my firm attached to an e-mail. We produced
16 that e-mail because it is not privileged. We don't enjoy a
17 privilege with Eric Benisek. He was never our co-counsel. We
18 never worked together with him, so we produced that.

19 Facebook then wanted litigation counsel's e-mail
20 with internal work product and privilege communications about
21 our communications with Eric Benisek.

22 We provided that, although we redacted the
23 internal work product and privileged communications. And now
24 Facebook would like the Court to review seven e-mails that are
25 between my firm and my co-counsel's firms about Eric Benisek

1 signing that declaration. And to avoid any doubt about
2 propriety, we would agree to provide those seven e-mails to
3 the Court for an in camera review, although we think it is
4 unnecessary. We don't like the idea about privileged and
5 internal work product going to the Court, but if the Court has
6 a concern about propriety, we would do that.

7 THE COURT: All right.

8 MR. NEWMAN: What questions does the Court have?

9 THE COURT: Yes. So I guess going roughly in
10 the order that you raised the issues.

11 First, on the scope of the waiver, you do agree,
12 of course, that I have already found there to be waiver of
13 privilege in this case. Correct?

14 MR. NEWMAN: Of course, Your Honor.

15 THE COURT: And when I look at the January
16 21st, 2015 opinion, we were not satisfied with either
17 party's proposal as to what the scope of the waiver should
18 be, but can you make any arguments that what we ultimately
19 decided was not pretty close to what Facebook asked us to
20 find was the scope of the waiver?

21 MR. NEWMAN: Your Honor, I agree that the Court
22 found a broad waiver. It is provided in that memorandum and
23 opinion. But the Court does limit it and gives an example
24 of limiting it. Namely, when Mr. Smoak reviewed documents
25 in connection with the waiver itself, the Court declined to

1 allow Facebook to see those documents and that is a lot more
2 narrow than what Facebook desires here.

3 Communications with litigation counsel are not
4 within the scope of the waiver in that memorandum order.
5 To the extent that they are, then there is a new body of
6 law being developed. Namely, that once there is a waiver,
7 a client is never allowed to seek advice about the subject
8 matter of that waiver because anything, past looking or
9 future looking, is within the scope of the waiver, and I
10 don't think the Court intended a waiver that broad.

11 The waiver was about the reasons for entering
12 into the December and November agreements and the execution
13 and implementation of them. All of that occurred before
14 litigation counsel was engaged. Since it all occurred
15 before litigation counsel was engaged, my communications
16 with my client and my internal work product are not within
17 the scope of that waiver.

18 THE COURT: Put aside whatever we intended by the
19 breadth of that waiver in January of this year. If there were
20 documents showing that you or other litigation counsel knew at
21 the time that you presented the December agreement into this
22 litigation that it was actually backdated, why is that it a
23 document or a communication that I should not want to see as
24 part of ultimately resolving whether this case should be in
25 this court?

1 MR. NEWMAN: Before I answer that question, I
2 feel compelled to state that we have always exercised candor
3 to the Court, my law firm, my co-counsel. That is the
4 reason why we filed this declaration that everyone was so
5 surprised by.

6 Again, nothing prompted it, no one requested it.
7 We learned about when the December agreement was executed.
8 We conducted an internal investigation. In fact, I can
9 disclose that my firm conducted one, and Strange & Butler
10 conducted a separate investigation, and we did that
11 intentionally because we wanted to make sure that we were
12 clear on the facts.

13 THE COURT: Now, is that before --

14 MR. NEWMAN: We then contacted Eric Benisek --

15 THE COURT: Let me stop you there. Is that
16 before or after Facebook started raising questions about the
17 timing of the execution of the agreement?

18 MR. NEWMAN: After the time that Facebook raised
19 questions. When Facebook raised questions, we consulted
20 with our client. We didn't have a relationship with Eric
21 Benisek. So we spoke with our client, and our client
22 assured us of when the agreement was executed, and then
23 later we learned otherwise. So we filed the declaration,
24 and we asked Eric Benisek to file a declaration.

25 THE COURT: Right. But --

1 MR. NEWMAN: He drafted it, he drafted it
2 entirely.

3 THE COURT: Let me stop you there. You at least
4 initially on the call today I think were characterizing your
5 disclosure and the declaration as entirely unprompted by any
6 concern of the Court or any concern of Facebook. But I
7 don't think that is quite right, and I think you have just
8 acknowledged you undertook the investigation and the efforts
9 in response to questions that Facebook was raising. Is that
10 correct?

11 MR. NEWMAN: Yes, that is correct. But we had
12 discovered nothing, and then when we did, we promptly filed
13 the declaration. It wasn't in response to a request to file
14 a declaration or a request to conduct that investigation.
15 We did that on our own, and we did it to exercise candor to
16 the Court. We weren't involved in the earlier decision
17 making.

18 I don't see a problem with the fact that the
19 document was postdated. Others on this call and the Court
20 perhaps may disagree. If I knew about this back in time,
21 I would have said that it was signed in March of 2013,
22 effective in December of 2009. It is proper under the law,
23 and that is the position I would have taken.

24 I have no interest in convincing the Court that
25 it was actually signed in December of 2009. It doesn't help

1 or hurt my case. I think the facts are relevant. I would
2 never have hid that from the Court. I don't believe that
3 anyone intentionally hid that from the Court.

4 I believe my client, because I interrogated my
5 client. I believe that my client understood the agreement
6 was signed in December of 2009, not in 2013.

7 THE COURT: Okay. But coming back to I guess
8 the other --

9 MR. NEWMAN: To the waiver --

10 THE COURT: Hold on. The question then remains
11 why isn't this an area in which under the arguably unique
12 circumstances here where there has already been a finding
13 of a waiver of privilege, and then, thereafter, in response
14 to questions about the timing of a document that your client
15 interjected into the case in an effort to show that it has
16 standing to bring this case, it later turned out that
17 representations that were made, maybe they didn't have to be
18 made but were made, as to the timing of that document turned
19 out to be false? Why isn't this an area that the Court
20 should continue to be particularly concerned with and
21 arguably even err on the side of finding a waiver and
22 allowing discovery so we can ultimately know what happened
23 here. And perhaps it will all reflect what you have said,
24 but if it doesn't, that would raise serious questions about
25 whether this case should be here.

1 MR. NEWMAN: Your Honor, the Court should always
2 be concerned about candor and propriety, compliance with the
3 rules of ethics. So when Your Honor asks why shouldn't the
4 Court be concerned, I think the Court should always be
5 concerned.

6 But that doesn't mean there was a waiver. The
7 privilege is absolute. And even if the Court has suspicions,
8 and I hope the Court does not, that doesn't mean that there
9 is an additional waiver. A waiver has to be intentional. The
10 waiver is provided by case law. The exception, the crime
11 fraud exception is the only one, and there has to be a basis
12 for it. There is no basis here that suggests that our client
13 used litigation counsel to perpetuate misstatement to Facebook
14 or to the Court.

15 So my answer is the Court should absolutely be
16 concerned, but that doesn't mean the privilege is waived. And
17 when the Court says why shouldn't I order more discovery, I'm
18 not saying that the Court shouldn't. Let's take discovery to
19 its natural end. And I think that we have been very compliant
20 in discovery. We have delivered documents. Discovery has
21 been broad. There has been some third-party discovery. We
22 have complied with it, produced everything.

23 There are going to be depositions. And
24 Facebook should ask my client, and Facebook should ask Eric
25 Benisek, and Facebook should ask any other witness about the

1 impropriety that it suspects and the Court should continue to
2 have its concerns and let's follow it to the natural end, but
3 that did not mean that there was an attorney-client waiver or
4 a work product waiver.

5 THE COURT: In terms of the searching and the
6 logging, how could it take hours and hours to search for
7 whether or not you have any e-mails or other documents that
8 reference a potential hard drive crash?

9 MR. NEWMAN: Your Honor, of the three subject
10 matters that Facebook requests, the hard drive is probably
11 the easiest one to search for. And my suspicion is that
12 there is nothing. But we have thousands of e-mails between
13 our firms and with our client, and I don't know if the
14 search queries will result in, but words like "hard" and
15 "drive" and "failure" would probably lead to thousands of
16 documents that require substantial review to find documents
17 that wouldn't assist here. They wouldn't assist here
18 because any documents relating to Eric Benisek's hard drive
19 failure would be in the custody and control of Eric Benisek,
20 not within my custody or control.

21 And I will represent to the Court, I didn't
22 know anything about a hard drive failure until I saw Eric
23 Benisek's declaration. I doubt there are any e-mails on it.

24 THE COURT: The defendant is seeking documents
25 that are potentially relevant to the diligence of the

1 efforts in discovering the timing of the December agreement
2 and issues related to being forthright with the Court about
3 the timing of that agreement and the interjection of that
4 document with the agreement, the interjection of that
5 document into the case and potential sanctions depending on
6 what the results of all that are.

7 In that context, isn't it relevant what you all
8 did in that January to April time frame? And I understand
9 your argument I shouldn't just find a waiver based on
10 relevance, but shouldn't I understand the circumstances here
11 at least make you search for and log those documents?

12 MR. NEWMAN: No, Your Honor. The Court should
13 not make us search for and log those documents because it
14 wouldn't help in connection with resolving the issue, even
15 the accusations, which I don't think there is a basis for
16 that my firm did anything improper. We would spend hours
17 and hours and hours. We'd have to hire an outside discovery
18 vendor. This wouldn't assist in the resolution of the case.
19 We would produce a privilege log that lists subject matters,
20 wouldn't disclose the communication itself because of course
21 that is privileged and it is work product. So we would have
22 this substantial log that takes hours and hours and hours
23 and hours to create but it wouldn't aid in the resolution of
24 the matter.

25 The way that the resolution of the allegations

1 should occur is that discovery should continue against my
2 client, discovery can continue against third-party witness
3 Eric Benisek and his law firm and anyone else involved, but
4 simply because it is relevant or there is a suspicion does
5 not mean that there is a waiver or that the Court or parties
6 are entitled to litigation counsel's privileged and work
7 product communications.

8 To the extent that that were the policy, then
9 any time a criminal defendant were on trial, his counsel's
10 communications would be disclosed for the jury to see. And
11 I'm not necessarily speaking of defense counsel at a criminal
12 trial but any lawyers who advised him, and that's not the
13 case. It is only the case if the lawyer's advice led to the
14 perpetration of the crime, and here there is nothing here
15 that suggests that.

16 The discovery is appropriate. The Court's
17 concerns are appropriate. I agree that it is relevant,
18 everything in my file is relevant to this case, but that
19 does not mean there is a waiver or that we should have to
20 undertake that substantial burden that is not going to
21 result in the resolution of these issues.

22 THE COURT: And on the in camera review, you
23 have a preference that if I go forward with that I should
24 let the Magistrate Judge do it first. Can you help me
25 understand why that would be?

1 MR. NEWMAN: Your Honor, I believe that the
2 case should move forward on the merits. I believe the Court
3 should rule on the pending summary judgment motion, but if
4 I'm being accused of impropriety, and it sounds like perhaps
5 I am, I don't know that it has been expressed but it is at
6 least implied, I want to be as direct and forthcoming as I
7 possibly can.

8 I don't want to disclose confidential
9 attorney-client communications or work product. I don't
10 want to spend and have my staff spend and have an electronic
11 evidence vendor who I pay spend hours and hours and hours of
12 time. But to the extent there is an alleged impropriety and
13 the Court would like discovery to continue we're not going
14 to oppose that effort, but really I think the case should
15 proceed on the merits. I think the Court should decide the
16 summary judgment motion based on standing. I think that
17 Facebook has substantial discovery related to these
18 ancillary issues.

19 I think Facebook has done a fantastic job at
20 causing distraction, and I think that we have contributed
21 to that distraction by filing a declaration that says
22 statements made at deposition weren't true. And I take some
23 responsibility for that because I represent a client that I
24 didn't know the statements weren't true until we learned
25 about it a few days before we filed the declaration.

1 I think the Court should allow the case to move
2 forward on the merits and perhaps discovery that Facebook
3 wants to undertake now could occur on a parallel track so
4 that we could move forward and Facebook can continue its
5 discovery on the impropriety, but the case won't be stalled
6 anymore. I think the Court should move the case forward.

7 THE COURT: All right. Thank you.

8 Mr. Gimblett, back to you. Respond as you wish.

9 MR. GIMBLETT: Thank you, Your Honor.

10 Well, firstly, on that last point, Facebook is
11 thinking to get through the discovery on standing hopefully
12 itself and regrets that we have had to come back to you
13 several times because of facts that were represented to us
14 proving to be false.

15 We do not believe that it makes any sense for
16 the Court to move to the merits before it is established
17 whether Kickflip has standing or not, and so it would be
18 proper to conclude the current phase of discovery and then
19 have supplementary briefing on the summary judgment motion
20 and decide that motion before moving the case forward.

21 We believe that can be done pretty promptly,
22 and that is why we come to the Court with these three very
23 specific requests today.

24 I think if the Court orders the disclosures
25 we've requested, we can finish off document production and

1 get through depositions and be before you on summary
2 judgment pretty promptly.

3 On the question of privilege. Mr. Newman keeps
4 saying that the privilege is absolute, which isn't really
5 true because privilege can be subject to waivers. It can
6 be subject to exceptions. And our contention today is that
7 both the waiver and an exception, the crime fraud exception
8 applies with regard to our request for documents related to
9 the November and December agreements.

10 He also treats the privilege as if it belongs
11 to him, but as we all know, attorney-client privilege
12 belongs to the client, Kickflip. And Kickflip waived
13 this privilege in January 2015 -- January of 2014 when it
14 submitted the first Smoak declaration. That declaration
15 treats this privilege as both a sword and a shield. Mr.
16 Smoak had refused to answer questions relating to the
17 reasons for the December agreement in his November 25th
18 deposition. And in his declaration in January 2014, he set
19 forth a very learned and erudite counter to the reasons,
20 the legal reasons for that agreement. There are documents
21 that we have requested from Kickflip that all predate that
22 January 2015 waiver.

23 Now, as Mr. Newman pointed out, the starting
24 point for that waiver were questions relating to the reasons
25 for the December agreement.

1 We now know, and what we didn't know in January
2 of 2014, that the reasons for the agreement specifically
3 include creating a record of ownership to establish standing
4 in this litigation. And, therefore, the documents that we
5 are seeking up to October 2013 relate essentially to that
6 core issue of the opinion waiver.

7 Finally, I would note that Mr. Newman has made
8 much of the April 2012 engagement of his firm.

9 As I said earlier, in response to your question,
10 I'm not going to draw any conclusions about what happened
11 until I have seen the entire documentary record. One thing
12 I do know from my own experiences, and it is not unheard of,
13 for law firms to be talking to prospective clients before
14 they get engaged. And so I certainly don't regard the date
15 of the engagement letter in April 2012 as dispositive of
16 the fact whether there was any discussion before that date,
17 perhaps including March of 2012 between litigation counsel
18 and Kickflip.

19 Moving on to the second issue. Mr. Newman
20 mentioned that if there were any documents relating to the
21 failure of Mr. Benisek's hard drive, those would be in the
22 possession of Mr. Benisek.

23 While separately having a discussion with Mr.
24 Benisek about his production in this litigation, which
25 consisted of five documents, when we asked him why it was so

1 slim, one of the reasons that he put forward was that he had
2 given huge amounts of information previously to Kickflip's
3 litigation counsel, and he is refusing to produce anything
4 that he has already given to counsel.

5 So knowing both that litigation counsel has
6 those documents in his possession, knowing also that Mr.
7 Benisek is declining to produce materials from that document
8 set, that I think it would be, I think it is entirely
9 appropriate to ask Kickflip's litigation counsel to do that
10 search and to log what they find.

11 Third, the concern that Mr. Newman have stated I
12 think is significantly overstated. As many lawyers do, I am
13 confident, having searched through my files to find eventful
14 documents that clients are asking me for, and usually I
15 don't have to engage outside vendors to undertake that.

16 So I think what we have asked for is manageable,
17 it's reasonable, and it certainly goes to the heart of the
18 issues that concerned the Court back in June of this year.

19 THE COURT: All right. A couple more questions
20 for you.

21 With respect to the scope of the waiver of the
22 privilege as we found it in January, in our memorandum, it
23 sounds like what you are saying is that the waiver should
24 now be found to be a little broader than we found it there
25 because of what we've learned about the dating of the

1 December agreement. Is that what you're saying? And, if
2 so, do I really have a basis to do that?

3 MR. GIMBLETT: No, I think the language of the
4 waiver speaks for itself in the January 22 order. You were
5 very clear that it extended to the November and December
6 agreements, and what we are asking for is documents relating
7 to the November and December agreements. Certainly, what
8 we have discovered since you found the waiver increases
9 the relevance and the importance of Facebook being allowed
10 to have discovery within the scope of the waiver, but it
11 doesn't necessarily change what the limits of the waiver are.

12 THE COURT: In terms of the crime fraud
13 exception, I understand your contention that it may apply
14 even when the attorney is unaware that they're being used by
15 the client to perpetuate a fraud or a crime, but you do need
16 to show a basis to believe that the attorney was being used
17 to perpetuate, say, the fraud. Do you not have to show that?
18 And do you think you have made that showing at this point?

19 MR. GIMBLETT: We will have more to say on this
20 when we make our supplementary submission on the summary
21 judgment, but I think even the documents appended to
22 Kickflip's submission for today's telephone conference goes
23 some way towards establishing that. They include e-mail
24 exchanges between Andrew Hunter or Kickflip and litigation
25 counsel here in which Andrew Hunter forwards the December

1 agreement which he had signed just seven months previously
2 and makes no disclosure whatsoever in the e-mail that this
3 agreement was created in March 2012 and backdated.

4 So, yes, I think that even the limited documents
5 we have seen so far give cause to believe that as of October
6 2012, Kickflip was using counsel to misrepresent this
7 agreement. And I think it is quite likely that if you
8 ordered the additional discovery as we requested, we will
9 see more of that type.

10 THE COURT: But the only way that you have
11 articulated I think that I should give you the documents
12 that you are seeking, the first of the issues today, is
13 either to find that it's within the scope of the waiver I
14 have already found or, if not, I understood you to be saying
15 I need to find today that you have made out a case adequate,
16 met your burden to show application of the crime fraud
17 exception.

18 Are you taking that position that you have met
19 your burden there or only that you think you are on your way
20 to making that?

21 MR. GIMBLETT: No, we believe that the burden
22 is met on the basis of what we already know about the way
23 in which the December agreement was created and how it was
24 presented to the Court. Obviously, in a three-page letter
25 brief for today's teleconference, we didn't really have the

1 pleasure to lay that out at great length.

2 But we did attach an exhibit which is extremely
3 relevant I think to this issue, which shows that when it was
4 created in March of 2012, it was for the purpose of or it
5 was in light of personal financial needs and the Facebook
6 lawsuit.

7 That I think tells us pretty clearly that an
8 agreement was created, backdated to December of 2009 with
9 the express purpose of establishing standing in this lawsuit
10 which was then served up to Facebook and the Court as having
11 been concluded in December of 2009.

12 Those facts alone goes, I would say get you over
13 the line of a reasonable suspicion that the documents we're
14 asking for contain evidence of fraud.

15 THE COURT: Okay. Thank you. Mr. Newman, is
16 there anything else you want to add?

17 MR. NEWMAN: Yes, Your Honor.

18 In this profession that I have chosen, my
19 reputation is all I have. My reputation before the bench,
20 my reputation before opposing counsel, and my reputation
21 before clients.

22 We're not hiding anything, and we don't oppose
23 the investigation Facebook is doing. Facebook is correct
24 that my client owns the privilege. To the extent that it
25 has been waived, we've disclosed all documents in that scope

1 of the waiver, but the waiver has not extended beyond what
2 the Court found concerning the January 2015 opinion and
3 order and we have to protect our client's privilege and our
4 work product. The investigation can continue but we can't
5 disclose privileged communications. Thank you.

6 THE COURT: All right. Thank you.

7 You have given us a very difficult situation,
8 and I'm afraid I don't have an easy answer as to how to go
9 forward. I'm going to give you a partial answer now but
10 part of that answer is going to require more work from all
11 of you.

12 And I regret that because the case has moved
13 slowly. It has taken me time to resolve the issues you've
14 put in front of me. Even when I ordered status reports, it
15 has taken me time to figure out what to do in response to
16 status reports.

17 I'd really like to be in a position where everyone
18 can be fully heard on the standing, and then I can decide if
19 there is standing, and then the case can go forward. So
20 it's with reluctance that I reach the conclusion today that I
21 unfortunately need to keep proceeding as I have been which is
22 going to be requiring a status report and probably further
23 briefing to help me resolve the discovery dispute which will
24 ultimately help me resolve whether there is standing, whether
25 there is sanctionable conduct, whether this case should

1 proceed or not to the merits.

2 I'm not ready to get to the merits now, and I'm
3 not, under the circumstances, going to start the process of
4 discovery on merits. We are where we are for reasons that
5 have been described before and which include a finding of
6 a waiver of attorney-client privilege and a finding of a
7 startling admission about a document that was submitted to
8 the Court which was presented to the Court as something it
9 could rely on in determining whether there was standing and
10 therefore subject matter, a document that later turned out
11 to have been backdated in a way that certainly was not known
12 probably to anybody involved in the case on the phone today
13 but certainly at a minimum was not known to Facebook and was
14 not known to the Court.

15 So until we clear that up, under the circumstances
16 here, this case is really not going to move forward towards
17 the merits, which is why I was hoping I could just very simply
18 agree with one side or the other today and at least get you
19 moving a little bit forward, but I find reluctantly that I
20 can't do that.

21 So what are we going to do?

22 First, in terms of the request for logging, for
23 searching for documents and logging, I am granting Facebook's
24 request with the caveat that I do want the parties to meet and
25 confer now knowing that Kickflip is going to be made to search

1 for and log documents in the categories that the defendant has
2 asked for. But I want you now to put your heads together and
3 see how we can make the burden on Kickflip in doing that as
4 minimal as necessary.

5 So a date range, for instance, seems to be a very
6 obvious way to begin to do that. It may be that there are
7 other ways that perhaps search terms can be agreed upon. I'm
8 not quite sure. But I am going to make Kickflip do the
9 searching and the logging because I am concerned, I share
10 the concerns that Facebook has raised.

11 It may be that ultimately some or all of what
12 ends up on that log may have to be produced, but I'm not in
13 a position to decide that. But I do understand Kickflip's
14 concern that the burden not be any greater than necessary, and
15 so I do want the parties to meet and confer and see if you can
16 figure out a concrete way to go forward on the searching and
17 the logging consistent with what I have said.

18 Further, I'm going to go ahead and order you to
19 do the in camera review that you have essentially agreed on.
20 I'll refer the in camera review to the Magistrate Judge, and
21 I hereby order that either side can provide their discussion
22 of up to five pages of what they think the Magistrate may
23 need to know for context in order to conduct that in camera
24 review.

25 It should go without saying I don't think that

1 an in camera review always has to be in front of the
2 Magistrate Judge. Sometimes it's appropriate, sometimes
3 it's not necessary.

4 If I thought the rest of this case was ready
5 to move forward in a very expeditious fashion, I probably
6 would not bring another judge into it at this point, but
7 the case is not going to suddenly take off and move quickly
8 and so I'm not too worried about any extra time that might
9 be involved in getting the Magistrate Judge up to speed and
10 helping us resolve that portion of the dispute.

11 In terms of the first request, the bigger
12 question about whether I should order Kickflip to produce
13 these documents of communications with litigation counsel
14 and the plaintiff before October 14th of 2013, the date that
15 the plaintiff introduced the December agreement into this
16 litigation, I wish I could decide which way I am going to
17 go on that today but I just simply can't.

18 There are difficult questions about the scope
19 of the waiver that I have already ordered and how it relates
20 to today's request, particularly in light of what has been
21 learned in discovery to this point about the backdating of
22 the December agreement. I think it is fair to say that in
23 our January 2015 ruling, we thought we were much closer to
24 Facebook's position and articulation of the scope of the
25 waiver than what Kickflip was arguing, and certainly some of

1 what I have seen I think in the letters leading to today,
2 positions that Kickflip may have taken about how narrow the
3 waiver was that we found don't seem consistent with the full
4 scope of the waiver that I thought I found in January of
5 this year.

6 But privilege is important, and I'm reluctant to
7 take any step on a phone call based on three-page letters
8 that may inadvertently overstate the scope of the waiver and
9 so that is where I am going to need assistance.

10 I'm further going to need assistance on the
11 application, if any, of the crime fraud exception to the
12 attorney-client privilege. Even after the questioning, I'm
13 a little unclear as to whether the defendant I guess -- I
14 guess I understand they think that they can meet their
15 burden under the case law based on what they have already
16 learned. I think they recognize they haven't shown me in
17 just a three-page letter where I think only one paragraph is
18 devoted to crime fraud, they haven't shown me yet how they
19 meet that burden, but I think it is appropriate to give them
20 the opportunity to do so because it could well be on that
21 basis that I would grant the discovery sought, the documents
22 in Category 1.

23 Again, I'm uncomfortable making that decision
24 today in the context of something less than full briefing on
25 an issue as important as the crime fraud exception to the

1 attorney-client privilege. So I believe I'm going to need
2 full briefing on some sort of motion about the application
3 of attorney-client privilege and the potential waiver, the
4 breadth of the waiver that has already been found, how that
5 has been impacted by what has been learned in discovery
6 subsequent to my ruling in January as well as that the
7 application of the crime fraud exception. I think I am
8 going to need full briefing on all of that.

9 And, again, I regret needing you all to do that.
10 I regret needing to put the further time and effort into
11 it on my part. I regret that it will keep this case from
12 progressing materially for quite some time, but having
13 considered all of the alternative options, I find, again
14 reluctantly, that I think that is the best one and the
15 appropriate one in the context of this case.

16 So the end result is I am ordering you to meet
17 and confer and provide a joint status report to tell me
18 exactly what you are going to give me and on what basis in
19 terms of the further briefing.

20 I would like to get that joint status report
21 back from you as soon as possible so I can get you on your
22 way towards doing that. But I'll now turn to you for your
23 thoughts as to how soon you can meet and confer and get back
24 to me on what I have asked you to do. First, Mr. Gimblett.

25 MR. GIMBLETT: I think we can meet and confer

1 quite quickly. I'd like to believe that we can get
2 something to you by the end of the week. I think in view
3 of the way it worked out last time, it might be prudent to
4 give ourselves until early next week, say Tuesday, close on
5 Tuesday.

6 THE COURT: Mr. Newman, what do you think of
7 that?

8 MR. GIMBLETT: Thank you, Your Honor, and
9 Mr. Gimblett. We would agree to Tuesday of next week.

10 THE COURT: Okay. Then I do order the joint
11 status report consistent with what I outlined to be provided
12 to me by next Tuesday, and we will try to turn to it as soon
13 as we can.

14 I should ask now, are there other questions?
15 First, Mr. Gimblett.

16 MR. GIMBLETT: Just one observation, Your Honor,
17 which is that a scheduling order that governs this phase of
18 discovery in which the deadlines for depositions are keyed
19 off of the close of document production.

20 Our view is that we're not yet to the point
21 where we can say that document production is closed, because
22 we have these outstanding issues. If we see the clock for
23 those depositions is still ticking, I don't know if it makes
24 any sense for us to try to depose witnesses until we resolve
25 these issues and Kickflip has complied with whatever orders

1 the Court has issued as a result of this dispute.

2 THE COURT: Well, that is something I think you
3 will want to take up in your meeting and conferring. And I
4 should add if there are any modifications to the schedule,
5 or any other work that either or ideally both parties think
6 I should enter as a result of what I said today in your
7 further meeting and conferring I would appreciate if you
8 submit proposed forms of those orders with your submission
9 next week.

10 Is there anything else, Mr. Gimblett, from your
11 side?

12 MR. GIMBLETT: No, that's it. Thank you, Your
13 Honor.

14 THE COURT: Okay. Mr. --

15 MR. DORSNEY: Your Honor?

16 THE COURT: Yes.

17 MR. DORSNEY: Your Honor, if I may. It's Ken
18 Dorsney. May I have an opportunity to speak for a moment?

19 THE COURT: Sure.

20 MR. DORSNEY: I guess I just want to ask the
21 Court, to the extent that the Court is concerned about the
22 propriety of my co-counsel in submitting the declaration, is
23 that a basis for the relief that the Court is trying to give
24 now? It is definitely something that -- to me, it sounds
25 like based upon Facebook's representations about something

1 that I am not sure they have identified specifically,
2 there is a question in the Court's view as to whether or
3 not my co-counsel and I guess potentially my firm acted
4 with propriety in submitting the declaration to clarify our
5 understanding of the dating of that document. But I don't
6 believe that that evidence or that specificity has been put
7 forth to the Court.

8 To the extent the Court is basing its relief today
9 on that assertion, is it possible to have that specified?
10 Because if we go through this process months and months, and,
11 of course, I can only speak for myself. I'm aware of no
12 impropriety in connection with the filing of that declaration,
13 but to the extent we go through months and months and the
14 Court has shaped its relief on that assertion but we don't
15 have any specificity, then it leaves us with no opportunity to
16 seek some type of recovery for all of that time and burden and
17 expense. So I guess I would just like to respectfully ask the
18 Court if some allegation from Facebook as to impropriety on my
19 co-counsel is a basis for the relief that the Court is trying
20 to shape.

21 THE COURT: I appreciate you raising the
22 question. I don't have anything further to say at this time
23 than what I have just said at more length than I had hoped
24 to articulate it with, and I'm asking for more assistance
25 from the parties. And you can certainly raise any concerns

1 or issues you wish in the submissions on Tuesday.

2 Are there any other questions from the plaintiff?

3 No?

4 (Pause.)

5 THE COURT: I'll take that as a "no." Thank you

6 all very much. We'll look for your submissions on Tuesday.

7 Good-bye.

8 (Telephone conference ends at 11:47 a.m.)

9

10 I hereby certify the foregoing is a true and accurate
11 transcript from my stenographic notes in the proceeding.

12

13 /s/ Brian P. Gaffigan
14 Official Court Reporter
15 U.S. District Court
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